VIRGINIA IRON, COAL & COKE CO. et al. *v.* ODLE'S ADM'R.

Sept. 16, 1920.

[105 S. E. 107.]

1. Master and Servant (§§ 92 (1), 316 (1)*)—Physician to Attend Injured Employee Held Independent Contractor; for Negligence of Physician Employer Is Liable if Contracting to Furnish Medical Aid.—The relation of a doctor to a coal company employing him, with money deducted from wages of employees for a doctor, to attend its employees when sick, relative to liability of the company for any negligent failure of the doctor to attend a sick employee, is not that of agent, nor of servant, but of independent contractor; for whose neglect, however, the company is liable, if it was under a contractual obligation to the employee not merely to employ a competent doctor, but to furnish the employee medical treatment in case of sickness.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 364, 365.]

2. Master and Servant (§ 92 (1)*)—Employer Contracting without Expectation of Profit Merely to Provide Doctor Not Liable for His Failure to Attend Sick Employee.—A coal company which makes regular deductions from wages of employees for doctor, and employs a competent doctor to attend them, is not liable for failure of the doctor, of which it had no notice, to attend one of the employees when sick and requesting his attendance; there being no evidence that it made or expected to make a profit on the transaction, or that it undertook to furnish competent medical attention to its employees, other than merely to provide a competent doctor whose services should be available to them, without additional charge.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 365.]

3. Corporations (§ 456*)—Contract to Furnish Employees Medical Attention at All Times Not Ultra Vires.—A contract of a coal corporation with its employees absolutely to furnish them medical attention at all times during survice would not be ultra vires.

[Ed. Note.—For other cases, see 3 Va.-W. Va. Enc. Dig. 564.]

4. Appeal and Error (§ 724 (2)*)—Assignment Must Point Out Error with Certainty.—An assignment must point out alleged error with such certainty as will enable the reviewing court without searching the record to say whether error was committed.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 503.]

5. Appeal and Error (§ 728 (1)*)—Assignment to Permitting Question Should Point Out Error.—It is not enough for an assignment to say the court erred in permitting a certain question without pointing out wherein the error consists, unless the error is manifest.

[Ed. Note.—For other cases, see 1 Va.-W. Va. Enc. Dig. 503.]

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*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.

6. Trial (§ 251 (8)*)—Instruction Making "Any" Refusal of Employer's Doctor to Attend Ground of Liability Misleading in Not Embracing Gravamen of Defense.—Instruction in action against a company employing plaintiff and a doctor employed by the company for negligent failure of the doctor to respond to a call, making "any" refusal ground of liability, if not error, is misleading; the gravamen of the defense being that the refusal was for a good and sufficient cause.

[Ed. Note.—For other cases, see 7 Va.-W. Va. Enc. Dig. 727.]

7. Master and Servant (§ 286*)—Paramount Duty of Employer's Doctor to Attend Sick Employee Question of Fact.—Relative to duty of a doctor employed by a company for its employees to attend, on call, a pneumonia patient several miles away, when he had in the camp, where he was, five or six cases of pneumonia and several hundred of "influenza," it cannot be said, as matter of law, that his duty to him was paramount to other patients, also ill, unless they were in equal danger; but what he ought to have done in the circumstances is largely dependent on his good-faith judgment at the time.

8. Death (§ 82*)—No Recovery for Suffering of Decedent.—There can be no recovery for the physical pain and mental suffering of decedent; the right of action for death from wrongful or negligent act being a new and original one given decedent's relatives, and not a mere survival of his cause of action.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 229.]

9. Appeal and Error (§ 1175 (5)*)—Final Judgment Rendered on Reversal Where there Cannot Be Further Evidence.—The facts proved not establishing any liability against a defendant, and the plaintiff having had full opportunity and the evidence having been as full as the circumstances admit of, the court on reversal will, under Code 1919, § 6365, render final judgment of dismissal.

[Ed. Note.—For other cases, see 4 Va.-W. Va. Enc. Dig. 712.]

[Note.—For editorial comment, see 6 V. L. R., N. S., 694.]

Error to Circuit Court, Wise County.

Action by James A. Odle's administrator against the Virginia Iron, Coal & Coke Company and another. Judgment for plaintiff, and defendants bring error. Reversed, and as to the one defendant dismissed, and as to the other remanded for new trial.

Lewis A. Nuckols, of Roanoke, and *Fulton & Vicars,* of Wise, for plaintiffs in error.

Werth & Werth, of Tazewell, for defendant in error.

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*For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes.